176. Cox's predecessors constructed the cable systems in the Cox Service Area in the mid-1970s. Cox acquired the systems in 1999 and has operated cable systems in and around the Cox Service Area since then.[182]

177. Cox's predecessor entered into a pole attachment agreement with Arkansas Power & Light Company on January 1, 1985 and assigned that agreement to Cox. This agreement is currently in effect (the "Cox Pole Agreement").[183]

178. Cox's predecessor built almost all of the Cox Service Area cable systems prior to 1985.[184] On information and belief, until approximately 2002, Cox' engineering, construction and maintenance practices had ever been a source of dispute, or even controversy with EAI.

2. Cox's Upgrade of the Malvern, Magnolia, Gurdon and Russellville

179. In 2002 Cox began an upgrade of the cable systems in Malvern and Magnolia.[185] The upgrade allowed Cox to expand dramatically the video services it could provide, including advanced communications service such as high speed Internet access.[186]

180. Cox completed the Magnolia and Malvern upgrade project in 2003.[187]

181. Throughout year-long upgrade, EAI was aware of the project and raised no objections to Cox's engineering, construction and maintenance methods.[188]

182. In 2001, Cox began setting its own anchors. Prior to that, EAI consented to Cox's use of EAI anchors for attachment. This was consistent with EAI's position during the initial construction of the cable plant.[189]

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[182] *See id.* at ¶ 10.
[183] Cox Pole Agreement (Exh. 2D).
[184] Declaration of Jeff Gould at ¶ 12 (Exh. 3).
[185] *See id.* at ¶ 14.
[186] *See id.*
[187] *See id.* at ¶ 15.
[188] *See id.* at ¶ 16.
[189] *See id.* at ¶ 17.

183. Cox is currently preparing to upgrade its system in Russellville and is completing its upgrade in Gurdon. USS inspected some of the Gurdon plant before the Gurdon upgrade was completed, and plans to inspect the remainder after completion.[190]

3. USS Arrives on the Scene

184. On information and belief, in March 2002, EAI hired USS to conduct a comprehensive pre-construction inspection of EAI poles in Magnolia and Malvern to determine the necessary make-ready costs involved with the upgrade. In addition, when these upgrades were complete, EAI hired USS to conduct a *full* post-construction inspection.[191] In all instances, EAI retained USS without an RFP and without competitive bids.[192]

185. Since USS commenced inspections in early 2002, Cox has received numerous invoices for inspection-related charges in Malvern and Magnolia totaling approximately $289,121.52. However, the invoices do not provide any itemization, description of charges, or information other than the USS invoice number, the billing period and a total amount due.[193]

186. EAI did not begin providing itemized invoices to Cox until March 2004.[194]

187. At a meeting in Greenville, Mississippi on July 21, 2004, two Entergy representatives – told five Cox employees, that Entergy's principal motive was to upgrade its aerial plant at the expense of cable operators.[195]

188. Specifically, this Entergy representative stated that Entergy had retained a contractor (identified later in the meeting as USS) and that an integral part of that contractor's (USS') marketing strategy (which the Entergy representative referred to as its "dog and pony

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[190] *See id.* at ¶ 18.
[191] *See id.* at ¶ 30.
[192] *See id.* at ¶ 19.
[193] For example, the May 17 EAI invoice simply state "Invoice No: 1084345 with an amount due of $43,644.09." Cox Invoice attached hereto as Exhibit 28.
[194] Declaration of Jeff Gould at ¶¶ 21-22 (Exh. 3).
[195] *See id.* at ¶ 24.

show") was that USS promised Entergy that it would recover the full amount of its audit costs from cable operators, get its aerial plant refurbished, *plus* earn a profit of 10%.

189. This, of course, accounts for Entergy's zeal to embrace and defend USS and its inspection program.[196]

190. EAI is charging Cox the same unreasonable, discriminatory and unjust charges as it is charging Comcast, Alliance and WEHCO.

191. EAI has grossly overcharged Cox for:

(a) failing to allocate properly individual and common costs among other attachers;

(b) inspections of telephone company poles and poles upon which Cox has no attachments;

(c) charging for USS' defective attachment inventory; and

(d) imposing an unreasonable "overhead" charge marking up USS charges by 5 to 8 percent.[197]

192. In addition, upon information and belief, EAI has inspected poles on which Cox has no attachments.

193. The above notwithstanding, EAI has been reasonable in some instances. For example, EAI had agreed to allow Cox to retain its own firm to conduct pre-inspection for the Magnolia, Malvern, Gurdon and Russellville upgrades. Cox and EAI specifically agreed that Cox's contractor, Utility Consultants, Inc. ("UCI"), would conduct the pre-inspection and make its engineering recommendations and that those recommendations would be reviewed by USS.[198]

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[196] *See id.* at ¶ 25.
[197] *See id.* at ¶ 34.
[198] *See id.* at ¶ 26.

194. EAI also appeared to be willing to be reasonable with respect to its engineering and construction standards. For example, Entergy joint-use personnel appeared more willing to relocate Entergy electric facilities, such as transformers into the designated electric space rather than automatically placing the make-ready burden on Cox.[199]

195. In general, Entergy was reasonable and accommodating to Cox in Gurdon, Arkansas. In Russellville, however, where USS is calling the shots, it is a completely different story.[200]

196. Specifically, in Russellville, USS rejected the same kinds of engineering accommodations that Entergy had agreed to in Gurdon and rejected engineering and make-ready analysis in Russellville that closely resembled the engineering and make-ready analysis EAI had approved in Gurdon.[201] Only this week, with the threat of an FCC complaint looming, has USS begun accepting the engineering and make-ready submitted by Cox.[202]

4. USS Post-Construction Inspection Results

197. USS has completed post-construction inspection work in Magnolia and Malvern. So far, Cox has received $18,000 in make-ready invoices, but has not yet received invoices for USS' services.[203]

198. To date, EAI and USS have issued numerous work orders to Cox as a result of the inspection.[204] These work orders have directed Cox to correct approximately 419 alleged violations of the NESC or the 1985 Cox Pole Agreement in the communities of Magnolia and Malvern.[205]

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[199] *See id.* at ¶ 27.
[200] *See id.* at ¶ 28.
[201] *See id.* at ¶ 29.
[202] *See id.* at ¶ 29.
[203] *See id.* at ¶ 30.
[204] *See id.* at ¶ 31.
[205] *See id.* at ¶ 31.

199. Many of the clearance violations Entergy cited are for facilities well within the standards set forth in the NESC. EAI has also notified Cox that a number of poles require replacement because of clearance issues associated with Cox facilities. However, on some of these poles, EAI is in violation as well and the **only** way to bring EAI's electric facilities into compliance is by replacing the pole. With a few exceptions,[206] EAI is holding Cox responsible for the full cost of the pole replacement.[207]

200. To date, Cox has corrected approximately 296 items from the USS work orders.[208]

201. Throughout the inspection process, Cox has unsuccessfully requested that EAI/USS apply safety standards in a fair and non-discriminatory manner, and to otherwise treat Cox in a just, reasonable and non-discriminatory manner.[209] Cox believes that further efforts at resolution would be fruitless.

VI. EAI'S PERMITTING FREEZE IS A DENIAL OF ACCESS IN VIOLATION OF 47 U.S.C. § 224

202. Under 47 U.S.C. § 224, a utility is obliged to provide cable television systems with "nondiscriminatory access to any pole, duct, conduit or right-of-way owned or controlled by it." 47 U.S.C. § 224(f)(1).[210] A utility pole owner may only deny a cable television operator access to its poles for insufficient capacity, or for reasons of safety, reliability, and generally applicable engineering purposes. 47 U.S.C. § 224(f)(2).

203. Until recently,[211] EAI refused to permit Comcast and Alliance to make any further attachments on EAI poles until each Complainant completes corrections of the violations in each

[206] In Gurdon, Entergy paid some costs for risers. *See id.* at ¶ 32.
[207] *See id.*
[208] *See id.* at ¶ 33.
[209] *See id.* at ¶ 37.
[210] *See also* 47 C.F.R. § 1.1403(a).
[211] Comcast and Alliance recently submitted a small number of applications, which Entergy granted conditionally. Based on Entergy's prior position that application approval is conditioned on clearing circuits of all violations, it is unclear what Entergy's position will be going forward.

circuit.[212] EAI's position was that it will permit additional attachments only after EAI conducts a *post-inspection survey and determines that the entire circuit is free of violations will EAI.*[213]

204. After literally years of USS inspections of Comcast and Alliance facilities, and the correction of thousands of alleged "violations," EAI has yet to clear a single circuit.[214]

205. Although EAI has asserted that it cannot permit additional attachments to be installed on its poles by Comcast and Alliance for reasons of safety and reliability, as stated above, the majority of the alleged "violations" attributed to Complainants are not safety violations at all, but are in full compliance with the NESC and industry standards.[215]

206. While EAI has imposed a "zero-tolerance" standard on cable by freezing cable plant deployment in multiple communities, it looks the other way when it comes to EAI's own safety violations, including ones that present true hazards. In addition, while Complainant Cox has not yet suffered the stark permitting freeze, the fact that Entergy has been consistently rejecting make-ready and engineering specifications,[216] thus delaying roll-out of its facilities, provides ample cause for concern.

207. A technical violation for a cable-to-telephone NESC clearance issue generates a demand for immediate correction—and a work stoppage—until all repairs in the circuit are completed.[217] But EAI/USS' position on a low-hanging EAI triplex or service drop, well within reach of a person's hand over a yard, is that it is "grandfathered" under the NESC. EAI/USS'

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[212] Declaration of Marc Billingsley at ¶ 28 (Exh. 6); Declaration of Bennett Hooks at ¶ 40 (Exh. 4).
[213] Declaration of Marc Billingsley at ¶ 28 (Exh. 6); Declaration of Bennett Hooks at ¶ 41 (Exh. 4).
[214] Declaration of Marc Billingsley at ¶ 42 (Exh. 6); Declaration of Bennett Hooks at ¶ 42 (Exh. 4). EAI has been somewhat more accommodating to Alliance in Plumerville on engineering standards, and as a result Alliance's Plumerville system is approximately 100 violations away from a full clean-up. However, a great number of these violations are caused by low sagging neutrals or low hanging triplex that EAI will not or cannot move up. Consequently, these violations cannot be corrected and the permitting freeze remains in effect. Declaration of Bennett Hooks at ¶ 26(Exh. 4).
[215] *See generally* Harrelson Report at Article B (Exh. 15).
[216] Declaration of Jeff Gould at ¶ 29 (Exh. 3).
[217] Declaration of Marc Billingsley at ¶ 28 (Exh. 6); Declaration of Bennett Hooks at ¶ 40 (Exh. 4).

also claims that since it is a drop, it is owned by the customer, and somehow EAI is absolved from responsibility.[218]

208. EAI, as the owner of monopoly essential facilities, knows that Complainants have little choice but to attach to EAI's poles in order to both build new plant to serve new customers and to upgrade existing customers.[219] By literally holding Complainants' plant and services deployment hostage, EAI is leveraging its monopoly ownership of the poles to force Complainants to pay millions of dollars for technical corrections that do not affect the safety or reliability of the poles.

209. EAI has created an unacceptable and uncertain business environment for Complainants, who have obligations under federal law[220] and under its contracts with local franchising authorities to provide its services within specified time frames.[221] If prohibited from providing the services they must provide, or if they cannot meet established time schedules to provide these services, Complainants could suffer additional penalties from parties other than EAI.[222]

210. Other, less tangible but more devastating harm will result as well. If Complainants are unable to meet their commitments, or to be responsive to existing or potential consumers, they will suffer significant harm to reputation and good will.[223]

211. Imposition of burdensome and avoidable costs on the delivery of broadband services also has serious competitive implications. Complainants face real video competition

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[218] Declaration of Bennett Hooks at ¶ 26 (Exh. 4);
[219] *See* note 4, supra.
[220] *See e.g.*, Title VI, Communications Act of 1934, as amended, 47 U.S.C. § 521 *et seq.*
[221] Declaration of Bennett Hooks at ¶ 46 (Exh. 4).
[222] *See id.*
[223] Declaration of Marc Billingsley at ¶ 29 (Exh. 6); Declaration of Bennett Hooks at ¶ 43 (Exh. 4). Complainants have been unable to serve several hundred customers due to EAI's permit freeze. Declaration of Bennett Hooks at ¶ 44 (Exh. 4); Declaration of Marc Billingsley at ¶ 30 (Exh. 6). In addition to the loss of good will, this has resulted in the loss of revenues and subscribers for which Complainants are entitled to monetary relief from Entergy.

from satellite dish providers. In more populous urban and suburban areas, Complainants face *real broadband competition from satellite and telecommunications companies' DSL offerings* and their imminent fiber roll out, making any obstructions (including cost increases) to network upgrades and line extensions extremely harmful.[224] Every ounce of goodwill in this environment is precious and the loss of good will means loss of customers.[225]

212. This Commission has recognized that promoting competition and developing advanced communications services is in the public interest.[226] EAI's permit freeze works directly against these important goals by causing delays in new build out and upgrades and/or increasing construction costs. This is exactly the effect that Congress sought to prevent in enacting 47 U.S.C. § 224.[227]

VII. USS' SURVEY IS DEFECTIVE

A. Entergy Has Unlawfully Inflated Cable Operator Invoices With "Phantom" Attachments

213. Entergy has billed Arkansas operators for an excessive number of attachments to its poles. For example, Comcast had been billed for 38,691 pole attachments for the Comcast Service Area in the 2003 invoicing cycle.[228] However, in early 2004, without notice or back-up,

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[224] For example, Comcast has received requests to service a new subdivision in Arkansas which will grow to 180 homes. However, extension of Comcast's cable plant would require access to 2.3 miles of EAI pole plant to reach the subdivision. The EAI freeze prevents the extension of cable broadband to this new subdivision because there is no other economically viable alternative to reach these homes. Given the competitive situation, it is also likely that DBS will end up serving these homes simply because cable has been blocked by EAI. Declaration of Marc Billingsley at ¶ 30 (Exh. 6).

[225] Declaration of Marc Billingsley at ¶¶ 31-32 (Exh. 6); Declaration of Bennett Hooks at ¶ 45 (Exh. 4).

[226] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble (purpose of the Telecommunications Act of 1996 is "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.").

[227] *See In the Matter of Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments* ("*Telecom Order*"), 13 FCC Rcd. 6777, at ¶ 2 (1998) ("The purpose of Section 224 of the Communications Act is to ensure that the deployment of communications networks and the development of competition are not impeded by private ownership and control of the scarce infrastructure and rights-of-way that many communications providers must use in order to reach customers.").

[228] Declaration of Marc Billingsley at ¶ 45 (Exh. 6).

Comcast received an invoice for 68,054 attachments, 76% more than the prior invoice.[229] This count is apparently based upon an inventory of attachments taken by USS during the comprehensive pole inspection process that began in early 2002.[230]

214. In order to verify the accuracy of that data, Comcast performed a test count.[231] Among other things, Comcast found that USS included numerous attachments on SBC poles in the count.[232] Comcast informed EAI of this error.[233]

215. EAI apparently then conducted a new analysis and sent Comcast another invoice for 50,283 attachments dated May 17, 2004.[234] At a May 26, 2004 meeting with EAI, Comcast again requested EAI's attachment data for a test area so that it could verify EAI's attachment count.[235] EAI agreed to provide such test data at that meeting.

216. By September 8, 2004, Comcast still had not received the test data, although in a meeting with USS on that date a portion of the test data was provided. At that meeting Comcast renewed its request for the remaining test data.

217. On October 4, 2004 (prior to Comcast's receipt of any additional test data) EAI sent Comcast a letter demanding payment for the unsupported attachments, including a demand for over $340,000 for back rent for the unverified attachments.[236]

218. On October 11, 2004, Comcast finally received the additional test data originally requested on May 26. Comcast's analysis of this data, however, identified numerous errors and the use of attachment counting methodologies inconsistent with past practice of the parties. For

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[229] *See id.* at 45.
[230] *See id.* at 45.
[231] *See id.* at 46.
[232] Comcast has a separate pole agreement with SBC and pays rent to SBC for attachments to SBC poles. *See id.* at ¶ 46.
[233] *See id.* at 47.
[234] *See id.* at 47.
[235] *See id.* at 47.
[236] *See* Letter from Dave Inman, Joint Use Administrator, Entergy, to Mark Grimmet, Director of Business Services,

example, it appears that EAI/USS is applying new standards to counting drop attachment in the latest inventory.

219. Comcast and its predecessors have never submitted applications for connections to drop poles.[237] Entergy has administered Comcast's and its predecessors' applications over the course of up to thirty years without raising any question regarding this practice. Until USS included drop poles in its count of attachments in the disputed 2004 invoices, Comcast never received any notice from Entergy that drop poles were to be included.

220. It is unjust and unreasonable for Entergy to assess retroactive penalties for connections to drop poles where the practice of the parties, as here, had been not to apply for connections to drop poles.[238]

221. The Commission should direct that at most Entergy may require attachment fees for connections to drops on a prospective basis from the date of the Commission's order.

222. In addition, it is unjust and unreasonable for Entergy/USS to count every bolted attachment on a pole as a billable attachment.[239] This practice is inconsistent with Entergy's own written standard of counting any attachment within 12 inches of one another as a single attachment, industry practice and long-established law.[240]

223. Contrary to the specific explanation of this standard (*see* Letter provided to Comcast on October 4, 2004), USS advised Comcast that it included every bolted attachment on a pole in calculating billable attachments. USS' approach is inconsistent with Entergy's policy,

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Comcast, dated October 4, 2004, attached hereto as Exhibit 29 (the "Inman Letter").
[237] Declaration of Marc Billingsley at ¶ 50 (Exh. 6).
[238] *See Mile Hi*, 13 FCC Rcd. 13407 (1998), *aff'd PSCo* Decision, 328 F.3d 675 (DC Cir. 2003).
[239] *See* Inman Letter (Exh. 29).
[240] *See* 47 C.FR. § 1.1409; *Implementation of Section 703(e) of the Telecommunications Act of 1996, Amendment of the Commission's Rules and Policies Governing Pole Attachments*, 13 FCC Rcd. 6777, at ¶¶ 83-91 (1998).

resulting in a significant overstatement of billable attachments as well as a substantial improper demand for unauthorized attachment penalties.[241]

224. Comcast has conducted a test count to verify Entergy/USS' recent count.[242] However, EAI has not relinquished demands for back rent and other fees associated with the disputed count.[243]

225. Comcast is also concerned that the variations in USS' billable attachment count do not take into account the changes in the poles' ownership that may have occurred between EAI and SBC over time.

226. On information and belief, EAI has acquired an unknown number of SBC poles over a number of years. However, Comcast pays SBC for attachments to its poles and the invoices received from SBC have not reflected any material reduction in the number of attachments that would reflect a change in pole ownership from SBC to EAI.[244] Likewise, EAI has provided no notice to Comcast over time notifying Comcast of new ownership of particular poles by EAI and advising Comcast that it is no longer necessary to pay SBC for such poles.[245]

227. Complainants are concerned that the USS pole audits include poles SBC previously owned and for which Comcast has been paying pole rent consistent with its agreements with SBC.

228. In light of the numerous defects Comcast identified, it is highly likely that USS' inspection of Alliance's, WEHCO's and Cox's facilities will reveal similar defects.

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[241] Declaration of Marc Billingsley at ¶ 53 (Exh. 6).
[242] *See id.* at ¶ 46.
[243] *See* Inman Letter (Exh. 29).
[244] *See* Declaration of Marc Billingsley at ¶ 54 (Exh. 6).
[245] *See id.* at ¶ 55.

229. It is unjust and unreasonable for Entergy to require Complainants to pay penalties or back rent on poles Entergy acquired from SBC without notice to attachers.[246]

230. The Commission should compel EAI to conduct an accounting regarding the transfer of ownership of poles in the Complainants' service areas and direct that no retroactive pole rents or unauthorized attachment penalties may be collected by EAI on former telephone company poles for which pole rent fees have already been remitted to the telephone company.

B. Entergy And USS Have Failed To Ensure Adequate Quality Control

231. USS has failed to take ordinary care and conduct reasonable quality control inspections of its own work. For example, in the USS survey of Circuit N-520 in the Alliance Service Area there were poles on USS "gig sheets" that did not exist in the field.[247] Similarly, USS failed to locate at least 100 poles in its audit of Circuit N-520. There were even poles, and violations on those poles—not present on EAI maps—that did not exist on the gig sheets but that Alliance has fixed.[248]

232. Comcast has had the same problems as Alliance with the quality of USS' work.

233. Comcast discovered that USS labeled the same Circuit twice under different names. As it turned out, Circuits K-130 and K-110, contained the exact same poles. Even though they were labeled as different circuits, USS inspected the same poles twice—once in July 2003 and again in October 2003.[249] The results of these two surveys were not identical.

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[246] *See Cable Telecommunications Association of Maryland, Delaware and District of Columbia, et al. v. Baltimore Gas & Electric Company and Bell Atlantic-Maryland*, 16 FCC Rcd. 5447, at ¶ 7 (2001).
[247] Declaration of Bennett Hooks at ¶ 37 (Exh. 4).
[248] *See id.*
[249] Declaration of Marc Billingsley at ¶ 66 (Exh. 6).

234. For example, in the July 2003 survey of the Circuit K-110, USS found a total of 105 alleged "violations." Since Comcast had not corrected any of these "violations" by the time USS conducted its the second survey, the results should have been identical.[250] They were not.

235. Instead, USS' second survey, conducted in late October of 2003 produced 71 "violations."[251]

236. On only 46 out 93 poles, the USS inspectors agreed there was some type of violation.[252] Of those 46 poles, the inspectors cited the exact same violation on only 26.[253]

237. Because of the numerous errors in USS' surveys, Comcast and Alliance have found it necessary to conduct a complete re-audit of their attachments at their own expense.[254] WEHCO and Cox have ample reason to believe that if Entergy is left unchecked, they will be forced to do the same.

238. EAI failed to conduct any quality control to assure that the surveys were conducted accurately and reasonably efficiently. This is an unjust and unreasonable term or condition of attachment.

VIII. EAI REQUIRES UNREASONABLE SAFETY STANDARDS FAR IN EXCESS OF THE NESC

239. USS' improper application of applicable codes and industry-accepted field practices has caused a number of errors in its survey that, in turn, has caused an inflated number of "violations" that Entergy/USS is attributing to Complainants.

240. As previously stated, USS has virtually completed its initial inspections of the Comcast and Alliance Service Areas and portions of the Cox and WEHCO Service Areas. In

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[250] *See id.* at ¶ 67.
[251] *See id.*
[252] *See id.* at ¶ 68.
[253] *See id.*
[254] *See id.* at ¶ 39; Declaration of Bennett Hooks at ¶ 38 (Exh. 4).

connection with these inspections, USS issued work orders to the Complainants directing the correction of tens of thousands of "violations" as summarized below:

Company	"Violations"	No. of Poles Inspected (Estimated)
Comcast	45,013	38,691
Alliance	7,000	8,600
WEHCO	1,546	1,314
Cox (Malvern and Magnolia)	419	3,900

241. Entergy/USS is requiring the Complainants to "repair" vast numbers of conditions that do not violate the NESC or the EAI Pole Agreements and/or were likely caused by Entergy or other attachers.[255]

242. On information and belief, Entergy/USS is not imposing these requirements on the telephone companies on the same poles.

243. On information and belief and Entergy is not correcting its own NESC and contract violations on the poles.

244. Comcast has analyzed the 45,013 "violations"[256] it has been directed to repair and they fall into the following categories:

"Violation" Category	No. of "Violations"
Clearance issues (pole and span between power and telephone)	18,870
Bond to all Vertical Grounds	6,637
Detach cable guys from Entergy Anchors	5,303
Residential Drops	8,959
Guy Markers	4,101
Power Supplies	274
Total	44,144[257]

[255] *See* Harrelson Report at pp. 4-6 (Exh. 15).
[256] Declaration of Marc Billingsley at ¶ 18 (Exh. 6).
[257] Approximately 44,144 of the total 45,013 Comcast "violations" fall into these disputed categories. The remaining issues are far fewer in number and are less controversial. Generally the remaining 869 issues fall into a several different categories cited by EAI/USS, none of which have more than a few hundred examples and are not material to this dispute (i.e." J-Hooks" (483), "Other" (201)).

245. On information and belief, Comcast's sampling is consistent with or will be consistent with the violations attributable to the other Complainants.

A. EAI Refuses To Acknowledge The Grandfathering Provision Of The NESC With Regard To Complainants' Attachments

246. Arkansas state law and the EAI Agreements provide that the NESC applies to attachments on Entergy poles. The NESC is published by the Institute of Electrical and Electronics Engineers, Inc. and adopts standards to safeguard people from hazards related to the installation, operation, or maintenance of (1) conductors and equipment in electric supply stations, and (2) overhead and underground electric supply and communication lines.[258] The NESC is a voluntary standard, however, it has been adopted by some state and local jurisdictional authorities, including Arkansas.[259]

247. The NESC contains a specific grandfathering provision to protect existing installations from costly and unnecessary modifications arising from changes in the NESC over time. Specifically the grandfathering provisions state that: "existing installations, including maintenance replacements, that currently comply with prior editions of the Code, need not be modified to comply with these rules except as may be required for safety reasons by the administrative authority."[260]

248. Furthermore, "[w]here conductors or equipment are added, altered, or replaced on an existing structure, the structure or the facilities on the structure need not be modified or replaced if the resulting installation will be in compliance with either (a) the rules that were in

[258] NESC, 2002 Edition, Abstract and § 1, p. 1.; Harrelson Report at p. 9 (Exh. 15).
[259] *See* 126 03 Ark. Reg. 011; Ark. Code Ann. §§ 11-5-303, 11-5-304, 23-17-236.
[260] NESC Section 013.B.2.

effect at the time of the original installation, or (b) the rules in effect in a subsequent edition to which the installation has been previously brought into compliance . . ."[261]

249. Regardless, EAI and USS are not applying the grandfathering provision. Instead, EAI and USS are requiring Complainants' upgraded facilities to comply with the latest edition of the NESC.[262] This is not reasonable.

250. In most instances, an upgrade does not involve installing new attachments or changing the locations of any of the existing attachments.[263] Consequently, these cable upgrades conducted by the Complainants are not "new attachments" subject to the standards set forth in the current version of the NESC, but are "modifications" and "additions" to an existing structure. As a result, they are grandfathered—or, in other words, subject to the NESC requirements in effect at the time the cable operator installed the original attachment.[264]

251. In accordance with FCC precedent, Entergy's and USS' refusal to apply the NESC's grandfathering provision is unjust and unreasonable.[265]

252. Furthermore, the EAI Pole Agreements states that Complainants' attachments must conform to the NESC, "including all supplements and future revisions..." Each revision of the NESC contains the grandfathering policy of Section 013, and therefore applies under the Agreements.

253. The Agreements also state that "[t]he requirements of the NESC may be supplemented as required by developments and improvements in the industry, such supplements to be mutually agreed upon and approved in writing by the Chief Engineer of the Cable

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[261] NESC Section 013.B.3.
[262] *See, e.g.*, Declaration of Bennett Hooks at ¶ 27 (Exh. 4).
[263] Declaration of Marc Billingsley at ¶ 12 (Exh. 6); Declaration of Bennett Hooks at ¶ 10 (Exh. 4).
[264] Harrelson Report at ¶ 11 (Exh. 15).
[265] *Knology*, 18 FCC Rcd. 24615, at ¶ 39.

Company and the Manager, Distribution Engineering, of the Electric Company."[266] Complainants have never agreed to be subject to requirements in excess of the NESC standards set forth at the time of the original installation of the attachment or to otherwise waive application of the grandfathering provision.

B. Entergy's Failure to Apply the NESC's Grandfathering Provision Has Caused Improper Identification of "Violations"

1. Twelve inch rule

254. EAI/USS finds Complainants' facilities to be "in violation" where there is less than twelve inches of separation between communications facilities. This is not a real NESC violation.

255. In 2002, the NESC was revised to include subsection 235.H.1 which states that "cables should be not less than 12 inches apart." Because the revision use "should," the twelve inch clearance revision is not mandatory. In fact, the 2002 edition allows for communications companies to agree upon lesser spacing.[267]

256. The vast majority of Complainants' communications cables were attached to Entergy poles prior to the of this 2002 edition.[268] As a result, at the time of installation, the twelve inch rule did not exist.[269]

257. It is unreasonable for Entergy to require re-spacing (at Complainants' expense) of thousands of grandfathered communications cables because a) twelve inch clearance it is not a mandatory rule and b) the facilities were installed prior to the 2002 NESC edition.

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[266] EAI Pole Agreements at § 2.3(A) (emphasis added) (Exh. 2A-2D).
[267] Harrelson Report at pp. 13-14 (Exh. 15).
[268] Declaration of Marc Billingsley at ¶ 7 (Exh. 6); Declaration of Bennett Hooks at ¶¶ 7-8 (Exh. 4); Declaration of Jeff Gould at ¶ 10 (Exh. 3); Declaration of Charlotte Dial at ¶¶ 6-7.
[269] Harrelson Report at p. 13 (Exh. 15).

258. Entergy's requirement that Complainants re-space their facilities to conform to *the twelve inch rule is also discriminatory. On information and belief Entergy is not requiring* the telephone company to correct any so-called "violations" of the 12 inch rule.[270]

2. Bonding

259. Entergy/USS is requiring bonding of Complainants' facilities on every pole where there is an Entergy vertical ground wire. For Comcast, this will require 6,637 new bonds.[271]

260. This is not reasonable. The NESC requirement on which Entergy/USS base this requirement did not exist until the 2002 edition.[272] The 2002 edition bonding requirement is not retroactive. Under a proper application of the NESC, all pre-2002 facilities bonded consistent with the prior versions of the NESC are grandfathered and comply with the NESC.

3. Residential service drops

261. USS requires Complainants comply with the current NESC clearance requirements for residential service drops. In other words, USS requires Complainants install the lines Complainants use to serve customers at 9 ½ feet from the ground in pedestrian access areas and 11 ½ feet over residential driveways.[273]

262. However, prior to 1990, when the vast majority of all Complainants' drops were installed, the clearances were 8 feet for pedestrian access areas and 10 feet for residential driveways.[274]

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[270] It is also discriminatory to presume that Complainants caused all such clearance issues and to require them to establish a 12 inch clearance when in many cases either telephone or EAI caused the problem in the first place.
[271] Declaration of Marc Billingsley at ¶ 21 (Exh. 6).
[272] Harrelson Report at p. 16 (Exh. 15).
[273] Harrelson Report pp. 17-18 (Exh. 15).
[274] *Id.*

263. Complainants' drops, in most cases, comply with the pre-1990 clearance requirements and should be grandfathered. Those that do not, have been or will be brought in compliance with the current code.

264. Many of EAI's residential drops fail to comply with current code.[275]

265. On information and belief, USS/EAI applies the NESC's grandfathering provisions its own facilities but refuses to apply grandfathering with respect to Complainants' residential drops.

266. This is unjust and unreasonable.

4. Anchors

267. Under the parties' prior course of dealing, the Complainants attached their facilities to EAI-owned anchors.[276] However, Entergy and USS have cited Complainants for thousands of "violations" for having facilities attached to EAI-owned anchors.

268. As a result, Entergy and USS have directed Complainants to vacate all EAI anchors and to establish separate anchors for their facilities. In total, EAI and USS have required Complainants to establish more than 5,000 separate anchors.[277]

269. The NESC does not prohibit Complainants from attaching to EAI anchors that have adequate capacity.

5. Other Clearances

270. Entergy and USS, are requiring a nine-inch separation between communications cables at mid-span (i.e., between poles). The NESC only requires 4 inches.[278]

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[275] *Id.*
[276] Harrelson Report at pp. 21-22 (Exh. 15); Declaration of Marc Billingsley at ¶ 21 (Exh. 6); Declaration of Bennett Hooks at ¶ 23 (Exh. 4); Declaration of Jeff Gould at ¶ 17 (Exh. 3).
[277] *See, e.g.*, Declaration of Marc Billingsley at ¶ 21 (Exh. 6).
[278] Harrelson Report at p. 20 (Exh. 15).

271. Entergy/USS is also requiring 40 inches separation between Complainants' cable and the neutral electric wire at the pole. The applicable NESC rule specifies a minimum 30 inches of separation if certain conditions are met.[279] Even where these conditions are met, Entergy and USS are requiring 40 inches of separation.

272. Entergy /USS is requiring 30 inches separation between Complainants' cable facilities and Entergy's neutral wire at mid-span. The NESC only requires 12 inches if certain conditions are met.[280] Even where these conditions are met, Entergy and USS are requiring 30 inches of separation.

273. As a final example, Entergy and USS are citing NESC violations where Entergy's primary voltage riser cables' riser guards have less than 40 inches clearance from the communications space on the pole.[281]

274. This is not an NESC violation. As explained in the Harrelson report, the primary voltage cable is a 230 C.1.b. type cable. Under NESC Subsection 239.G.1, Exception 1, 230C.1.b type cable may be within 40 inches of the communications space.

275. It is unjust and unreasonable for Entergy to refuse to acknowledge this NESC rule to require that Complainants make expensive corrections for what is a non-violation.[282]

276. More important, the primary voltage cable and associated riser is a part of Entergy's electric power plant. It is unjust and unreasonable to require Complainants to pay to for corrections that benefit Entergy.[283]

C. Entergy Unlawfully Attributes its Own Violations to Complainants

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[279] *See id.* at p. 22.
[280] *See id.*
[281] *See id.* at p. 23.
[282] *See id.* at p. 23
[283] *See* note 320, *supra.*

277. Entergy commonly adds street lights and outdoor lights to both Entergy and telephone company poles in a manner that creates NESC violations. For example, Entergy often mounts light brackets too close to the communications space, fails to keep the supply conductor loops the required 12 inches from communications and attaches power wires to the pole for the light closer than the 40 inches from communications. All of these conditions violate Entergy's own specifications.[284]

278. Unlike primary riser guards, Entergy's secondary riser guards for underground electric services must be at 40 inches above communications facilities. However, Entergy frequently installs conduit or insulating in violation.

279. Entergy commonly installs excessively long drip loops from transformers, secondary attachments on poles, and at outdoor lights, creating clearance violations with Complainants' facilities.[285]

280. One example of EAI's unreasonable allocation of cost and responsibility involves a squirrel had that electrocuted itself by chewing through the insulation of an EAI transformer secondary wire. The squirrel's fell from EAI's plant down to Cox's plant, where USS discovered it. Entergy cited Cox for a violation.[286]

281. Similarly, in Malvern, Arkansas, Entergy built a multi-phase transformer bank on top of—literally—Cox's cable plant without notice, creating multiple NESC violations. USS assigned Cox the responsibility for correcting the violations.[287]

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[284] *See id.* at p. 24.
[285] *See id* .at pp. 23-24.
[286] Declaration of Jeff Gould at ¶ 36 (Exh. 3).
[287] *See id.* at ¶ 39.

282. Despite the fact that either Entergy creates these violations or Complainants are not responsible, USS nonetheless attributes the majority of the "violations" it finds to Complainants.

283. It is unjust and unreasonable for Entergy to attribute its own violations to Complainants or to otherwise require Complainants to pay to correct Entergy's own violations.

D. Entergy's Policies Discriminate In Favor of the Telephone Companies

284. Although Entergy imposes unjust and unreasonable inspections and associated charges on Complainants, on information and belief, it is not imposing the same treatment on the telephone companies with facilities attached to the same poles as Complainants.

285. On information and belief, Entergy discriminates against Complainants by:

a. Not requiring telephone companies to remove facilities from Entergy-owned anchors;

b. Not requiring telephone companies to bond to all vertical grounds;

c. Not requiring telephone companies to correct clearance violations between telephone and power or between telephone and cable;

d. Not requiring telephone companies to bear the costs of USS inspections in accordance with the same unreasonable and illegal allocation formula imposed on Complainants; and

e. Not requiring telephone companies suspend all new attachments to Entergy poles prior to clearing all violations within the circuits.

286. Entergy's conduct is discriminatory and in violation of 47 U.S.C. §224.[288]

[288] 47 U.S.C. § 224(f) ("A utility shall provide a cable television system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it.").

IX. ENTERGY'S ALLOCATION OF INSPECTION-RELATED COSTS IS UNJUST AND UNREASONABLE

A. Inspection Costs for Poles on Which Complainants are Attached Must be *Shared Equitably to Reflect Joint Benefits*

1. Entergy derives a significant benefit from the information USS collects

287. USS' inspection is designed to provide a wide range of plant information valuable to Entergy. As a result, EAI derives substantial benefits with respect to its own plant management for each pole USS inspects. This is true whether or not Complainants are attached to the poles.

288. The scope of USS' inspection is set forth in USS' Work Codes.[289] USS collects the following information at each pole where a visible safety violation is observed, regardless of whether Complainants are attached or not:

a) Record pole owner / pole owner number

b) Record height and class of pole

c) Record GPS location

d) Record picture of attachments on pole

e) Record all foreign attachments on pole

f) Record heights of all attachments from the lowest power conductor and down

g) Record heights of all affected from the lowest power conductor down

h) Record all safety and contract violations observed by Inspector

i) Record recommended resolutions for safety violation(s)

j) Record any possible make-ready problems including deviations that might warrant a pole loading analysis[290]

[289] *See* USS Work Codes, attached hereto as Exhibit 30.

289. Where no visible safety violation is observed the inspector performs the following tasks:

a) *Record pole owner/pole owner number*

b) Record the height and class of the pole

c) Record the GPS location

d) Record picture of attachments on the pole

e) Record all foreign attachments on pole [291]

290. USS records this information for all such poles.[292]

291. USS does not provide Complainants with worksheets for poles without visible violations by Complainants, however, on information and belief, the information is recorded at such poles whether or not USS cites a violation.

292. Complainants do not derive a benefit from the vast majority of the information USS collects.[293]

293. Complainants derive a benefit only from a) the attachment count, b) at-pole and mid-span measurements and c) resolutions for clearance issues relevant to Complainants' facilities.[294]

294. However, other attachers, including EAI and SBC, implicated in clearance citations benefit equally from information related to at-pole and mid-span measurements and resolutions for clearance issues.

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[290] *See id.* at p. 2.
[291] *See id.*
[292] *See, e.g.*, Sample Worksheets, attached hereto as Exhibit 31.
[293] *See, e.g.*, Declaration of Bennett Hooks at ¶ 33 (Exh. 4).
[294] *See id.*

295. "The cost of an inspection of pole attachments should be borne solely by the cable company, if and only if, cable attachments are the sole ones inspected and there is nothing in the inspection to benefit the utility or other attacher to the pole."[295]

296. "[A]n inspection designed to yield information about more than cable attachments, and thus to benefit other pole users, should not be paid for solely by the cable company." [296]

297. It is an unjust and unreasonable term or condition of attachment for Entergy to require Complainants to bear all or most of the costs of USS' inspections.[297]

2. EAI's formula for allocating the cost of inspections is unreasonable

298. Despite the overwhelming benefits Entergy and the telephone companies derive, from the USS inspections, EAI charges Complainants the bulk of the inspection charges.[298]

299. For example, Entergy's invoice, dated December 12, 2003, shows that the original amount USS billed to Entergy is $22,258.25, plus a five percent markup, for Circuit G925.[299] As a result, Comcast was assigned 77.25% of the charge of the inspection of the 1122 poles in this circuit, totaling $17,195.49.[300]

300. EAI calculated Comcast's "share" of the Circuit G925 inspection costs by first determining what it refers to as the "Total Billing Base." This number is the sum of Comcast and other non-utility pole attachments in the Circuit (in this case 947 attachments) to the number

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[295] *Cable Texas, Inc. v. Entergy Services*, 14 FCC Rcd. 6647, at ¶ 13 (1999) (citing *Newport News Cablevision, Ltd. v. Virginia Power*, 7 FCC Rcd. 2610, at ¶ 9 (1992)).
[296] *First Commonwealth Communications v. Virginia Electric Power Co.*, 7 FCC Rcd. 2610, at ¶ 8 (1992).
[297] *Cable Texas, Inc. v. Entergy Services*, 14 FCC Rcd. 6647, at ¶ 13 (1999) (citing *Newport News Cablevision, Ltd. v. Virginia Power*, 7 FCC Rcd. 2610, at ¶ 9 (1992)); *First Commonwealth Communications v. Virginia Electric Power Co.*, 7 FCC Rcd. 2610, at ¶ 8 (1992).
[298] *See, e.g.*, Declaration of Bennett Hooks at ¶ 34 (Exh. 4); Declaration of Marc Billingsley at ¶ 17 (Exh. 6);
[299] *See* Comcast Allocation Invoice dated December 12, 2003, attached hereto as Exhibit 32.
[300] *See* ¶¶ 230-238, *infra*.